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No. 83-251

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

PRC HARRIS, INC.,

Petitioner,

v.

THE BOEING COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONER'S REPLY BRIEF IN SUPPORT OF THE PETITION

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1B Moore's Federal Practice, ¶0.409[6] (1983) 3, 5

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ARGUMENT

THE CASES IN OTHER CIRCUITS CITED BY RESPONDENT AS SUPPORTING THE HOLDING BELOW ARE INAPPOSITE

In Respondent's Brief in Opposition, two cases outside of the Second Circuit are cited as supporting the holding below that a dismissal for failure to comply with a local statute of limitations is a dismissal "on the merits" in the sense of a dismissal that prevents further suit on the cause of action in any jurisdiction. Those cases are Nilsen v. City of Moss Point, 701 F.2d 556, 562 (5th Cir. 1983) (en banc), and Cemer v. Marathon Oil Company, 583 F.2d 830, 832 (6th Cir. 1978). Neither case is apposite, however,

because they each deal with dismissals based on a limitations provision applicable in every state: Nilsen with the timely filing requirements of Title VII, 42 U.S.C. § 2000e-5(e), see Nilsen v. City of Moss Point, Mississippi, 621 F.2d 117, 119 (5th Cir. 1980), and Cemer with the federal statute of limitations applicable to age discrimination suits, 29 U.S.C. §§626(e), 255. Although it is true that in Cemer the court purported to rely on the effect of Rule 41(b) in support of its holding, 583 F.2d at 832, the leading federal procedure treatise has noted that the fact that the first dismissal was based on a statute of limitations applicable in every jurisdiction is the "more tenable justification" for

the holding. 1B Moore's Federal Practice, ¶0.409[6] at 336-37 (1983).

It is true that both of these decisions speak of a statute-of-limitations dismissal as being "on the merits". The confusion that leads respondent to cite Nilsen and Cemer in support of its position, however, is caused by the fact that the phrase "on the merits" can be used in three different senses modifying the word "dismissal". It can be used to mean: (1) a dismissal that examines and evaluates the substantive facts alleged to provide plaintiff a cause of action; (2) a dismissal that, while not actually reaching the substantive allegations, determines that plaintiff cannot sue again in any jurisdiction; and (3) a dismissal that does not

reach the substantive allegations but determines that plaintiff cannot sue again in the particular jurisdiction (but is not necessarily barred from suing elsewhere). These ambiguities have led the American Law Institute to discard the phrase "because of the possibly misleading connotations." Restatement (2d) Judgments §19, Comment a, p. 161 (1982).

Depending on the particular facts, a dismissal on limitations grounds can fall into any of these categories. In those rare instances where the limitations provision is an integral part of a created right, so that the running of the particular statute extinguishes the right, see 1B Moore's Federal

Practice ¶0.409[6] at 334 n.3 (1983), the dismissal falls into category (1). In cases such as Nilsen and Cemer, where the statute is uniform in all jurisdictions, the dismissal falls into category (2). And where, as in this case, the dismissal is based on a local statute of limitations not necessarily applicable in other jurisdictions, the dismissal is one in category (3). See Restatement of Judgments §49 Comment a, at p. 194 (1942).

Thus it is not enough to say that a statute-of-limitations dismissal is "on the merits"; the question is: is the particular dismissal one that bars the plaintiff's second suit? Where the dismissal in jurisdiction A is based on a local statute of limitations, and

jurisdiction B, otherwise open to the plaintiff, would apply a longer statute, the only modern decisional authority known to petitioner supporting the proposition that the first dismissal bars the second suit is the Second Circuit authority challenged by the petition in this case, authority that, as shown in the petition, is based on a reading of Rule 41(b) FRCP that cannot be squared with this Court's holding in Costello v. United States, 365 U.S. 265, 285, 81 S.Ct. 534, 545, 5 L.Ed.2d 551, 564 (1961).

Petitioner submits that it is clear that when this Court held in Costello that Rule 41(b) does not apply to dismissals on grounds that prevent the presentation of "the merits of [plaintiff's] claim,"

365 U.S. at 285, 81 S.Ct. at 545, 5 L.Ed.2d at 564, it was referring to what the court below called "the substantive issues raised" (A4), that is, in this case, whether Boeing breached its contract with PRC Harris. Boeing has never had to prepare to meet that dispute, since it instead raised an initial bar--the District of Columbia statute of limitations.*

Rule 41(b) FRCP performs a valuable function as a "rule of thumb" that provides the effect of a dismissal where the dismissing judge has the discretion to dismiss with or without prejudice (as in

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*Since the raising of such a bar mandates an automatic dismissal, the suggestion of the majority in the en banc Nilsen decision that a statute-of-limitations dismissal represents a "refusal" of the court to speak on the substantive issues, thus differentiating it from a dismissal on jurisdictional grounds, 701 F.2d 562, seems to confuse a limitations dismissal with one for laches. In any event, the "jurisdictional" dismissals there referred to are merely a subset of the "jurisdictional" dismissals under Rule 41(b) as interpreted by this Court.

the case of a Rule 12(b)(6) dismissal where the dismissal can result from a finding either that plaintiff has no cause of action or that plaintiff may have a cause of action but has failed to properly plead it) and has not specified his intent in the order of dismissal. See Weissinger v. United States, 423 F.2d 795, 798 (5th Cir. 1970) (en banc)("The fifth sentence of Rule 41(b) . . . establishes a procedure for construing the general and ambiguous dismissal order, one which does not say whether it is with or without prejudice."); United States v. Costello, 275 F.2d 355, 362 (2d Cir. 1960), aff'd, 365 U.S. 265, 81 S.Ct. 534, 5 L.Ed. 2d 551 (1961); see also, Sack v. Low, 478 F.2d 360, 364 (2d Cir. 1973). The Second Circuit

authorities challenged by this petition are the only federal appellate decisions of which petitioner is aware that have said that Rule 41(b) can turn a dismissal that could not otherwise so operate into a dismissal "with prejudice", and the decision below is the first that has squarely so held. Petitioner submits that such an interpretation is inconsistent with this Court's interpretation of the rule in Costello. See, in particular, 365 U.S. at 287 n.5, 81 S.Ct. at 546 n.5, 5 L.Ed.2d at 565 n.5.

Petitioner has found one decision outside of the Second Circuit applying that court's interpretation of Rule 41(b) to a statute-of-limitations dismissal, Chang v. Northwestern Memorial Hospital, 549 F.Supp. 90 (N.D. Ill. 1982). In that case the

dismissal on statute-of-limitations grounds of a state-court suit being prosecuted concurrently with a federal suit in the same state led to the incongruous situation of the federal suit, which had been timely filed, being dismissed, allegedly on the grounds of res judicata. Although the first dismissal had been stated to be "with prejudice", 549 F.Supp. at 91, the second court placed principal reliance on an Illinois statute modeled after Rule 41(b). 549 F.Supp at 94-95. The incongruity of a timely suit being dismissed for alleged res judicata because a second, untimely, suit in the same jurisdiction had been dismissed on limitations grounds is a direct result of the fallacy inherent in the Second

Circuit's interpretation of Rule 41(b): the belief that Rule 41(b) gives the dismissing judge the discretion to adjudicate, or to decline to adjudicate, "the merits" in a dismissal order clearly based on a ground that is a procedural bar unconnected with the merits of the claim. (This fallacy is further demonstrated at p. 10n of respondent's brief, where it is asserted that the discretion to dismiss "without prejudice" exists under "certain unspecified circumstances", without a suggestion of what those circumstances could possible be.) At least, in Chang, the District Judge invited the plaintiff to seek an amendment of the prior judgment of dismissal, clearly contemplating that such an amendment would allow the federal suit to proceed. 549 F.Supp. at 92.

CONCLUSION

The petition should be granted and the decision below reversed.

Respectfully submitted,

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October 13, 1983